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June 18, 1996

Jeffry R. Tindall, Ph.D., Chairman
New Jersey State Board of Psychological Examiners
P.O. Box 45019
Newark, NJ 07101

In re John M. Rotondi, Ph.D.
OAL Docket No. **BDS 05323-94N**
Our File No. **57049**

LETTER MEMORANDUM IN SUPPORT OF APPLICATION FOR RECONSIDERATION

My Dear Dr. Tindall and Members of the Board:

By his letter dated June 11, 1996, Mr. Paul Brush, Executive Director, Board of Psychological Examiners, notified counsel that the Board dismissed all of the charges against Dr. Rotonid except two (2), and that it has resolved to reject in part the Initial Decision of Judge Simonelli issued February 16, 1996 as to them. The letter further invites counsel to submit oral argument in mitigation of penalties at the next scheduled meeting of the Board, June 24, 1996.

On behalf of the Respondent, it is respectfully requested the matter of the fixing of sanction in connection with the findings of the Board be postponed and that the Board reconsider its proposed conclusions prior to their formal adoption and publication.

Procedural Status.

Mr. Brush's letter to counsel does not constitute a Final Decision of the Board. It is anticipated that the Board will formulate a statement of its findings as well as its conclusions with regard to the matters set forth in the notice to counsel and that these will be presented at some future time, subsequent to the Board's consideration of the argument of counsel regarding sanction.

It is respectfully submitted that the proposed conclusions announced by the Board will, upon reflection, be found to be inappropriate and unsupported, and properly to be reconsidered and modified or withdrawn entirely.

Applications for reconsideration, while routine practice before the Courts, are not common in connection with administrative proceedings, nor are they expressly provided for in the uniform rules applicable to them. Nevertheless, there is no rule forbidding reconsideration of proposed conclusions to be set forth in a final decision not yet rendered. See N.J.A.C. 1:1-18.5. The Board has ample authority to reconsider its findings of violation, on its own motion or that of an interested party, at any time prior to the adoption of its Final Decision.

DISCUSSION

A. The proposed conclusions.

Mr. Brush's letter describes the conclusions of the Board sufficient for purposes of argument as to sanction. The parties, however, will not be provided specific findings of fact sufficient to demonstrate their support in the record until publication of the Board's Final Decision.

The two (2) conclusions proposed to be reached by the Board contrary to those of Judge Simonelli, concern first the treatment provided of complaining witness P.C. by Dr. Rotondi and second, the requirement that he keep adequate records of that treatment.

B. "Improper course of treatment"

While the statement of violation provided by Mr. Brush is most general ("[failure] to provide competent and responsible treatment for her emotional disorder"), the Code reference cited in support of this conclusion is not:

> "13:42-10.8 Professional interactions with clients
> (a) ...
> ...
> (f) A licensee shall terminate a clinical or consulting relationship when it is reasonably clear that the client is not benefiting from it. In such instances, the licensee shall offer to help the client find alternative sources of assistance."
> N.J.A.C. 13:42-10(f).

Thus implicated is not Dr. Rotondi's method in treating P.C.'s disorder, but his failure to have terminated the clinical relationship with her prior to the time that he did so.

The phrases "reasonably clear" and "benefiting from it" are clearly relative; that is, they acquire meaning only from the circumstances to which they are addressed. Moreover, the reasoning process needed to support a finding of "reasonably clear" is that of the therapist, or a like expert, upon consideration of the facts and circumstance known to the therapist at the time the decision to terminate should have been reached.

C. The charge has never been considered before.

This charge, failure to terminate treatment, was never enumerated among the allegations of wrongdoing, either charged in the complaint or implied by its specifications. In fact, among the principal charges pressed by the State was the allegation that Dr. Rotondi had <u>abandoned</u> the client, another way of stating he should <u>not</u> have terminated the clinical relationship. To address the charge now is to do so at second hand, without the opportunity to examine the witnesses or interpret the documents directly.

Had it been otherwise (that is, had the Respondent had notice of such an accusation), then the record might well have addressed the many factual matters necessary to such a conclusion: The particular course of treatment and of conduct by the therapist and the patient throughout the clinical relationship; the nature and quality of the information regarding the patient's social, clinical and emotional history either provided to the therapist by the patient, or otherwise available to the therapist; a reliable, professional, clinical diagnosis or description of the patient's "emotional disorder"; an expert recital of the kind of facts or considerations appropriate to predict whether a course of treatment under particular circumstances will, at sometime in the future, benefit an individual suffering a given disorder, or, to the contrary, could never do so; and finally, the actual conduct of the therapist with regard to attempts to terminate the therapeutic relationship. **There is not one scintilla of evidence in the record before this Board, either by testimony or document, that demonstrates a violation of this charge.**

D. No expert opinion was elicited supporting this charge.

Forensic testimony presented by the State carefully avoided any discussion of the several expert opinions crucial to support this accusation. The State presented the testimony of two (2) experts, Drs. Dryer and Brown.

The testimony of Dr. Dryer was expressly limited to the assertion that, in his expert opinion, there was no evidence of any emotional disorder which would have impaired P.C.'s ability to relate historical truth. He did not examine P.C. to formulate his own opinion as to the emotional disorder she was suffering (if any); he made no attempt to formulate an opinion based upon the information that was available to him in this regard. More significant, he specifically limited the factual basis for his opinions to the behavior and statements of the complaining witness as they were reported to him by her. Dr. Dryer did not tender the opinion that Dr. Rotondi should have terminated his clinical relationship with P.C. at a time prior to the time that he did, either expressly or by implication.

Dr. Brown was presented as a treating psychiatrist and repeated as her testimony statements of the complaining witness made subsequent to the time her clinical relationship with Dr. Rotondi had been terminated. While Dr. Brown found nothing inconsistent between her findings and the suggestion that P.C. might have been suffering a personality disorder, she expressly declined to adopt that diagnosis, asserting that her evaluation of the patient and of records available to her was not intended or designed to elicit such an opinion.

Three (3) other experts testified. The testimony of Drs. Hagovsky and Zampardi was limited to the character of the Respondent and to statements made to them by Dr. Rotondi before the complaining witnesses complained of any wrongdoing. Neither had any knowledge of P.C. (neither, in fact, knew her name) and neither could have responsibly suggested she was suffering from any disorder let alone a specific one, or more relevant, that further treatment would not benefit her.

Dr. Matro sought to evaluate the complaining witness but was barred from doing so. She suggested, in the absence of an opportunity to validate her diagnosis clinically, that what had been made known to her (and which ultimately was made known to the Court) would have been consistent with a diagnosis of Borderline Personality. The principal feature, however, of this suggestion was hindsight: That is, the current recognition of past behaviors, which, by degree and in combination, suggest that at a prior time the patient was suffering a particular syndrome or disorder.

Dr. Matro's opinion was not challenged by the State, not because it agreed with it, but because the State insisted that, provided the ability of the witness to testify was not impaired, any diagnosis of the complaining witness was entirely irrelevant to the charges it was seeking to prove.

E. The evidence of record refutes this charge.

As indicated, a factual history establishing what the therapist knew and what the therapist did, and when he/she knew and did it, is likewise necessary to the suggested conclusion. Unlike the expert testimony discussed above, the record provides great detail addressed to this factual history. Both Dr. Rotondi and P.C. testified exhaustively as to what she told to him and when she told it, the questions he asked her, whether he sought to administer psychometric tests, whether he referred her for consultation or substitution to psychologists and/or psychiatrists, his purpose in persuading her to admit herself to Fair Oaks Hospital, his confidence that ultimately her condition would be remediated by the course he was following, and, critical to the point of controlling, the nature and extent of the changes in her behavior, her attitudes and her conversation over time. Dr. Rotondi's testimony regarding these and other significant matters, is the only credible evidence of record to be considered in connection with this charge, and it exhonorates Dr. Rotondi entirely of any claim he violated it.

F. The added charge is based upon intuition, surmise and assumption.

The additional finding proposed by the Board may be logical: Intuitively, a therapeutic relationship ending in the manner this one did, should have been terminated earlier. Neither the Code nor the Statute, however, declares as a violation of the Act either the inability to predict the outcome of a course of therapy or the inability to control a patient.

The Board must concede that it has no means of knowing what it was that the therapist knew and when the therapist knew it that might have established that the patient would not benefit from continuing therapy, except Dr. Rotondi's detailed description of the course of his treatment of P.C.

The Board may be satisfied, now, that as a matter of its expert judgment, Dr. Rotondi's treatment of P.C. did not benefit her, and therefore, as a responsible licensee, he ought to have terminated his therapeutic relationship sooner. Yet, there is no reason for these conclusions except its own intuitive understanding of what that relationship must have been throughout its five (5) year course.

Such a finding need not be subjective. There are appropriate means to establish facts and circumstances from which such a conclusion might logically be drawn. These means were never employed in this matter, precisely because the attorney general never contemplated the possibility that P.C., at the outset of her therapy program with Dr. Rotondi, throughout its course to the time of termination, and since that time to this very day, did not require a course of therapeutic intervention. Moreover, the attorney general never, throughout the three and one half (3 1/2) years this matter has been pending, allow that the psychological condition of the complaining witness had any relevance to any of the charges brought against Dr. Rotondi.

G. The facts of record support the contrary finding.

Nevertheless, as indicated, the record is not void of information pertinent to this charge. Dr. Rotondi testified over the course of several days, regarding the history of P.C.'s therapy. Although it was presented in the context of charges as framed at that time, which included no reference to any charge implicating the likelihood of benefit or the propriety of continuation, and for that reason is not easily analyzed for this purpose, it nevertheless clearly presents sufficient evidence not merely to refute this added charge, but to establish its converse.

From the outset, and for the first year and a half of her treatment program with him, P.C. was guarded and close-mouthed. She presented, claiming feelings of depression; she did not, voluntarily or otherwise, share with him her true feelings or a truthful history of her family, social and psychological experiences. He testified that he recommended psychometric testing but she adamantly refused; he testified that he requested information about prior therapy she might have received but at the outset she persistently refused to even discuss the fact of any prior intervention, let alone the details of time, place, person, issue or outcome. During this time, according to his testimony, she assured Dr. Rotondi that she was feeling better over time, more and more comfortable, and not so depressed, enough to warrant a reduction in the frequency of her appointments and the intensity of her therapy. Of great significance is the uncontested fact that throughout, until after termination of her therapy with Dr. Rotondi, P.C. functioned successfully as a public school teacher.

Only after more than eighteen (18) months of seemingly successful therapy did her interactions with Dr. Rotondi change. During this mid-period (from the fall of 1989 until January 1991), P.C. revealed increasingly more information about herself, both in conversation and by inference from her conduct. In response Dr. Rotondi experienced growing concern for P.C. He referred her to several different mental health providers throughout this period, some to determine the propriety of medication, others to determine the acceptability of a substitute therapist. On each of these occasions, P.C. adamantly refused to continue to see any other therapist but Dr. Rotondi.

And finally, during the time after the Fair Oaks episode (December 31, 1990 to January 3, 1991) until termination of therapy, a nineteen (19) month period, Dr. Rotondi sought to end his clinical relationship with P.C. but without interrupting the clinical help she obviously needed. It was only by the summer of 1992 and ultimately by early October that year, that the situation had so far deteriorated, that he concluded there was real danger to himself and his family as well as P.C. were the clinical relationship to continue.

H. There are simply no other facts.

These facts are the only facts of record pertaining to the conclusion sought to be adopted by this Board. In their entirety, they demonstrate, at minimum, that Dr. Rotondi did not artificially extend an unnecessary, useless or fruitless clinical relationship out of greed, contrary to a reasonable, reasoned, understanding of the needs of his patient. We submit, in fact, that he persisted solely out of an excess of concern that she continue to receive treatment which she needed.

Any conclusion that Dr. Rotondi violated the specified provision of the Administrative Code is at hazard if founded upon this record. Since there are no other facts which the Board can consider, it is respectfully submitted that upon its reconsideration, the Board will find as did Judge Simonelli, that the Respondent's treatment of P.C., including the time and manner of its termination, was appropriate under the circumstances, even if the Board does not join in her dictum:

> "... Dr. Rotondi should be lauded, not condemned, for his efforts in treating P.C. He did the best he could with P.C. Even P.C.'s present psychiatrist characterize[d] her as a very difficult patient. Dr. Rotondi also tried for many years to have P.C. hospitalized and to refer her to other professionals, but she refused." I.D., Hon. M. Simonelli, A.L.J.; page 45.

This assessment, to be sure, is that of a lay person, without specific schooling in clinical psychology. It nevertheless is apt and fair, for at bottom, all clinical techniques and standards of care derive ultimately from a single, simple source: An honest effort to serve the best interests of the patient.

It is not enough that the Board believes that a violation occurred. Evidence must be recited establishing that Dr. Rotondi dealt with P.C. other than in an honest effort to serve her best interests. Only then could this conclusion be comfortably declared. It is respecfully submitted there is no such evidence. The charge should be dismissed.

I. "Preparation and maintenance of client records".

The second of the charges upon which the Board seeks to sanction Dr. Rotondi is identified only by description and a reference to the Act (N.J.S.A. 45:1-21(h)). The cited section prohibits violation of any act or regulation of the Board; the regulation implicated by the description of the offensive conduct is N.J.A.R. 13:42-8.1, setting forth professional requirements regarding the preparation and maintenance of patient records.

J. The Board cannot reject exculpatory evidence without cause.

The evidence exhonorating Dr. Rotondi from this charge is complete and has been found credible. While the Board, even without the opportunity to have observed the witnesses, has ample authority to reject testimony in whole or in part, the law requires some evidence from the record remaining, which is sufficient to support the finding contrary to the rejected testimony.

It has been held under circumstances reviewed before, that P.C.'s testimony regarding the session at which Dr. Rotondi asserts his records were destroyed, was entirely incredible. The Judge goes on, in the context of her reference to the testimony corroborating Dr. Rotondi's description of that final session, to conclude that "It is, therefore, conceivable that P.C. ripped up her records and took them with her." I.D., Hon. M. Simonelli, A.L.J.; page 43.

K. No other credible evidence regarding this charge was presented.

To sustain this charge against Dr. Rotondi, the attorney general would have had to produce evidence not merely that P.C. did not destroy his records (i.e., that Dr. Rotondi's testimony in these regards was false), but also, that he failed to prepare fully appropriate records and maintain them to that time in accordance with the Code (i.e., similarily, that his affirmative sworn testimony to that effect was a lie).

L. Dr. Rotondi's testimony was corroborated.

As indicated, the manner in which these records were destroyed, and the explanation for the inability of Dr. Rotondi to deliver them upon request of the Board, was corroborated by the testimony of Mrs. Ripsen and Mrs. Rotondi. Moreover, there is similar corroboration for the fact that Dr. Rotondi maintained proper records in connection with the patient P.C. contemporaneous with his treatment of her. On January 3, 1991, P.C. demanded that Dr. Rotondi no longer prepare and maintain records of her treatment. She wrote:

> " ... I will only agree to continue in therapy if you promise to keep no written records on me. From now on the sessions are to remain strictly verbal. *Nothing written or recorded. " Letter, P.E.C. to Dr. Rotondi, January 3, 1991; R4 in evidence.

At least from the early months of 1989 until January 1991, it is evident that Dr. Rotondi maintained records; certainly, the only witness other than Dr. Rotondi as to the truth of that statment clearly implies that she believes that to be the fact.

M. The Rule does not create a mechanical, per se offense.

The charge could therefore be sustained only if by its language it is intended to sanction the failure to deliver records upon the demand of the Board, regardless of reason or justification. Yet surely such a construction is neither evident from the language of the regulation, nor reasonable as a basis for punishment. For if the Board were to construe the records requirement as a per se requirement, to be punished regardless of the circumstances causing the inability to deliver (of which failure to prepare and maintain is only one), then the regulation is divorced from reason and serves no legitimate public purpose. That cannot be the sense of this regulation.

The Board then is left to base this allegation simply upon its conclusion that Dr. Rotondi was unable to deliver these records because he failed to maintain them in the first place. The only evidence of record, however, is expressly to the contrary. No matter how unlikely or distasteful the conclusion to be drawn from that evidence of record, no matter how it violates the intuition of the Board or its members, no matter how unusual it is to find a licensee entirely blameless in the face of charges of the magnitude and number as were made here, the Board can draw no other conclusion.

Since there is absolutely no evidence of record that Dr. Rotondi failed to prepare and maintain patient records, this charge must be dismissed.

N. Dr. Rotondi has been proven innocent of all charges against him.

The charges alleging violation of N.J.A.C. 13:42-10.8 must be dismissed. These charges, that pertaining to failure to terminate therapy of no benefit to a patient, and that asserting failure to maintain proper patient records, are the sole remnants of the many charges originally made by the complaining witness, and adopted by the office of the attorney general. Those other charges, now proven to be false, are and always have been matters of fiction and fantasy. They play no role now in the deliberations of the Board, neither with regard to the sole charge remaining from the original complaint, nor to be the additional charge added by

hindsight, nor can they be considered in assessing the nature and extent of any sanction to be imposed upon any final finding of their violation.

It is, under the law, as if the attorney general had brought against Dr. Rotondi these two (2) charges alone from the outset. The Board has only to examine the record of the facts pertaining to this matter to determine whether either or both of these charges can be sustained, and if so, to appraise a sanction appropriate to these violations, and these violations alone, under the particular circumstances of their occurrence.

O. Dr. Rotondi served his patient well.

It remains above all, that all of the evidence presented by the parties and analyzed by the Administrative Law Judge establishes not merely by the preponderance of the evidence, but to a veritable certainty, that Dr. Rotondi acted as he did throughout the lengthy experience of P.C. in an attempt to serve what he understood to be her best interests. It remains for another forum to decide whether or not, in hindsight, he misperceived those circumstances or was justified in proceeding as he did upon the basis of a perception to which he was mislead. Likewise, it remains for other proceedings to determine whether anything that Dr. Rotondi did or failed to do in connection with this patient, departed from that standard to which the typical professional psychologist is properly to be held. As far as these proceedings are concerned, the question has been and remains only: Has Dr. Rotondi violated the Act. It is respectfully submitted that no acceptable evidence establishes that Dr. Rotondi violated the Act in any of its provisions or those of any regulation adopted pursuant to it, and in fact all of that evidence demonstrates to the contrary, that he is to be lauded, and not condemned, for his treatment of this difficult patient.

CONCLUSION

Professional psychologists hearing this history as a case presentation might well conclude, as a matter of professional insight, that this disastrous affair might have been avoided if Dr. Rotondi had been a better psychologist. Unless, however, this Board is willing to condemn every licensee who is proven, by hindsight, to have misdiagnosed or inappropriately treated a condition only ultimately revealed, and to do so as a violation of the practice act of sufficient magnitude to warrant public punishment, then these charges, as the many others before them, must be dismissed. To proceed otherwise, with full knowledge of the record, is to assume the authority of this Board to punish, not for what was, but for what should have been. The law nowhere permits this. More important, neither the interest of the public nor of the profession are served by it.

For the foregoing reasons it is respectfully submitted that the Board reconsider its proposed conclusions, and upon that reconsideration dismiss the two (2) remaining charges against Dr. Rotondi.

Respectfully submitted,

Leon S. Wilson, Esq.

Dated: June 18, 1996
xc: Paul C. Brush, Executive Director
Joan Gelber, D.A.G.
Nancy Costello Miller, D.A.G.